

## COMMENT

## PRETRIAL DETENTION OF WITNESSES

## I. INTRODUCTION

Restrictions on the individual liberty of persons suspected of committing no wrong should always be open to examination in order to determine whether their justifications are actually sufficient to warrant the deprivation imposed.<sup>1</sup> Every state and the federal government authorize procedures that can severely restrict the liberty of persons who are needed as witnesses<sup>2</sup> in criminal proceedings. Although he may be suspected of no criminal act,<sup>3</sup> a witness who is needed in such a proceeding may be subject to restrictions ranging from a duty to appear in answer to a subpoena<sup>4</sup> to the posting of bond to assure his appearance or imprisonment for failure to do so.<sup>5</sup> A very few jurisdictions allow detention only if it is impossible for the witness to testify by deposition, but even in these cases the witness may be held for limited periods of time for questioning.<sup>6</sup> In addition, the witness's freedom of travel may be limited to a certain community or jurisdiction.

Implicitly the requirement of bail or detention assumes, either expressly or covertly, that a subpoena backed by the threat of imprisonment for contempt is inadequate to guarantee the attendance of a witness at trial. Whether this contempt power is in fact inadequate; when it may properly be determined to be so; and what procedure will best balance the state's need with the witness's freedom are all questions that have not been fully explored. It is the position of this Comment that the requirement of bail or detention is unnecessary and ineffective in the vast majority of cases; that there are less restrictive alternatives open to the state which should be explored and utilized; that only a very limited number of detention procedures can meet constitutional standards of

<sup>1</sup> For a discussion of civil actions in which an individual is deprived of freedom without having committed a wrong, see Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75 (1968); Note, *Due Process for All—Constitutional Standards for Involuntary Civil Commitment and Release*, 34 U. CHI. L. REV. 633 (1967).

<sup>2</sup> The term "witness" is used in this Comment to mean a "person who happens to know something on the matter in issue." 8 J. WIGMORE, EVIDENCE § 2190, at 63 (McNaughton rev. 1961) [hereinafter cited as WIGMORE].

<sup>3</sup> Although an individual may be held as both a defendant and a material witness, cf., e.g., *People ex rel. Gross v. Sheriff of City of New York*, 203 N.Y. 173, 96 N.E.2d 763 (1951), this Comment is limited to consideration of the permissible restrictions on liberty that flow solely from the latter status.

<sup>4</sup> See, e.g., *Blackmer v. United States*, 284 U.S. 421 (1932). See generally 97 C.J.S. *Witnesses* § 4 (1957).

<sup>5</sup> For a statutory survey see Comment, *Cessante Ratione Legis Cessat Ipsa Lex (The Plight of the Detained Material Witness)*, 7 CATH. U.L. REV. 37, 38 n.7 (1957).

<sup>6</sup> See, e.g., Bail Reform Act of 1966, 18 U.S.C. §§ 3146, 3149 (Supp. III, 1968).

substantive and procedural due process;<sup>7</sup> and finally, that the fairer procedures are those which severely limit jailing of witnesses and impose penalties only for actual disobedience.<sup>8</sup> The areas of concern which will be considered in order to evaluate the restrictions imposed upon witnesses will include: (1) the relevant interests involved and the purpose served by detention of witnesses; (2) the available procedures for securing the attendance of witnesses other than restrictions on liberty in advance of misbehavior; (3) the current state laws securing the attendance of witnesses through procedures that restrict the liberty of the witness in advance of misbehavior; (4) the constitutionality of these methods; and (5) the use of detention of witnesses as a subterfuge for detention of a suspect without probable cause for arrest or in order to avoid affording the constitutional procedures given a person accused of a crime.

During the last few years there has been a revolutionary change in the attitude of courts toward the rights of criminal defendants.<sup>9</sup> At the same time, there has been no judicial reconsideration and little careful study<sup>10</sup> of the power that a state can exert over a witness,<sup>11</sup> of the

<sup>7</sup> See text accompanying notes 126-97 *infra*.

<sup>8</sup> See, e.g., ILL. ANN. STAT. ch. 38, §109-3(d) (Smith-Hurd Supp. 1969). Illinois has eliminated the requirement of money bail for witnesses and requires only a written undertaking. For the text, see note 47 *infra*.

<sup>9</sup> The Supreme Court has vigorously persisted in making the fourth, fifth, and sixth amendments applicable to the states by incorporation into the fourteenth amendment. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (trial by jury for "serious crimes"); *Gilbert v. California*, 388 U.S. 263 (1967) (right to counsel at lineup); *Washington v. Texas*, 388 U.S. 14 (1967) (right to compulsory process in criminal trial); *Klopper v. North Carolina*, 386 U.S. 213 (1967) (right to speedy trial); *Griffin v. California*, 380 U.S. 609 (1965) (prosecutor cannot comment on failure of accused to testify); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confrontation); *Malloy v. Hogan*, 378 U.S. 1 (1964) (right against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel in noncapital offenses); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusion of illegally obtained evidence). At the same time these rights have been expanded and broadened. See, e.g., *Katz v. United States*, 389 U.S. 347 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967); *United States v. Wade*, 388 U.S. 218 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>10</sup> The subject has received some attention in student works. Comment, *Cessante Ratione Legis Cessat Ipsa Lex (The Plight of the Detained Material Witness)*, 7 CATH. U.L. REV. 37 (1958); Comment, *Material Witnesses in Criminal Proceedings: Securing and Assuring Their Attendance*, 18 MO. L. REV. 38 (1953); Comment, *Witnesses—Imprisonment of the Material Witness for Failure To Give Bond*, 40 NEB. L. REV. 503 (1961); Comment, *Confining Material Witnesses in Criminal Cases*, 20 WASH. & LEE L. REV. 164 (1963); Comment, 5 SYRACUSE L. REV. 213 (1954). For a discussion of the British system of detention of witnesses see Samuels, *Criminal Procedure (Attendance of Witnesses) Act 1965*, 115 L.J. 539 (1965).

<sup>11</sup> One of the reasons that there has been no new law on the rights of witnesses is the small amount of actual litigation in the area. Detained witnesses are usually indigent and, therefore, unable to retain a lawyer to attack their detention. And what has been said about the illegally detained suspect is even more true in the case of a witness committed to jail for failure to post bail: "As a practical matter, a writ of habeas corpus is available to a suspect only if he has counsel. Thus, except in the case of the professional criminal, whose counsel is likely to know when his arrest takes place, access to a writ is dependent upon access to counsel. . . . The indigent suspect is not likely to resort to the writ, because he knows he cannot afford to retain counsel." W. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 407 (1965).

rationale of that power, or of the procedural limitations on its exercise. Some state legislatures have, however, recently sought to balance the rights of witnesses with those of the state when revising codes of criminal procedure, and others may do the same when they move to conform criminal procedures to the standards set for defendants by the Supreme Court.<sup>12</sup>

In striking the balance to determine what can lawfully be done to curtail the freedom of an individual merely because he may have information needed by the state to perform its prosecutorial functions and to give the accused a constitutionally fair trial,<sup>13</sup> three competing interests must be examined.

1. One interest is that of the state in enforcing its criminal law. In order to perform its prosecutorial functions, the state needs to have information for its investigations,<sup>14</sup> and witnesses available for

The development of traditional exclusionary rules, culminating in *Miranda v. Arizona*, 384 U.S. 436 (1966), has placed suspects in a better position in this regard than witnesses. The threat of exclusion of a confession will tend to assure that counsel is available to suspects, unless the police are for some reason willing to forego use of the confession or its fruits.

No similar protection, apparently, has been afforded witnesses. *People v. Portelli*, 15 N.Y.2d 235, 205 N.E.2d 857, 257 N.Y.S.2d 931 (1965), a pre-*Miranda* decision, refused to exclude the testimony of a witness beaten, kicked, and burned with lighted cigarettes by the police. Although much of the language in *Miranda* is apparently directed at any type of custodial interrogation—*e.g.*, 384 U.S. at 446-47, 471 (“we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation”)—the only rule laid down was that the “warnings required and the waiver necessary in accordance with our opinion today are . . . prerequisites to the admissibility of any statement made by a *defendant*.” *Id.* at 476 (emphasis added). Furthermore, most of the discussion was framed in terms of protection of the fifth amendment’s privilege against self-incrimination. In any event, no decision has been found applying *Miranda* to a person detained solely as a material witness.

<sup>12</sup> The PROPOSED N.Y. CRIMINAL PROCEDURE LAW §§ 330.10-70 (Thompson 1968) includes new provisions regarding material witnesses. The bill was submitted to the 1968 Legislature by the Temporary Commission on Revision of the Penal Law and Criminal Code “for study purposes,” and was not acted upon by the Legislature. After further revision a final draft has been submitted for passage at the 1969 session of the Legislature. See N.Y. Times, Feb. 2, 1969, at 1, col. 4, 56, cols. 3-6; TEMPORARY COMM’N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, PROPOSED N.Y. CRIMINAL PROCEDURE LAW (Thompson 1968) [hereinafter cited as N.Y. PROPOSED CRIM. CODE].

Pennsylvania has revised its criminal procedure, including the provisions pertaining to material witnesses. PA. R. CRIM. P. 4014. See also ILL. ANN. STAT. ch. 38, § 109-3(d) (Smith-Hurd Supp. 1969); MASS. GEN. LAWS ANN. ch. 276, § 47 (1968).

<sup>13</sup> The state also has an interest in giving civil litigants the opportunity to settle disputes, and, thus, provides parties with compulsory process to secure witnesses. Since there is no intrusion into the witness’s liberty beyond the duty to answer a subpoena (and punishment for disobedience), there is no question of restrictions prior to misbehavior.

<sup>14</sup> In *Miranda v. Arizona*, 384 U.S. 436, 477-78 (1966), the court referred, in dictum, to an investigatory function of the police: “General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.” Although the on-the-scene or “field” interrogation no doubt restricts the liberty of an innocent person because he is a witness, the subject has come to the Supreme Court in terms of “suspects” in the “stop and frisk” cases. See *Sibron v. New York*,

trial.<sup>15</sup> However, the state has an interest in encouraging persons to come forward with information relevant to the investigation and prosecution of crime. Whatever policy the state takes toward witnesses may influence citizens in performing this duty. If these procedures impose heavy burdens on potential witnesses, such as extended periods of detention or high bail, such witnesses may be discouraged from coming forward. On the other hand, the state may hope to counteract the known reluctance of witnesses to become involved by taking strong measures to assure their appearance at trial once they have been found.

2. A competing interest is that of the witness, an individual who has committed no wrong, to have maximum freedom of movement.<sup>16</sup>

3. Finally, a criminal defendant has at least two interests. He is guaranteed the right "to be confronted with the witnesses against him."<sup>17</sup> Although the situation may vary depending on the nature of a particular witness, the defendant may have an interest in having prosecution witnesses present at trial so that he may cross-examine and challenge their veracity rather than allowing the state to introduce their testimony in hearsay form. In this area the defendant's interest in having the witness present at trial may coalesce with that of the state, since infringement of the defendant's right will result in the reversal of convictions obtained.<sup>18</sup> Greater freedom afforded a witness may thereby limit the defendant's opportunity to cross-examine a witness and have his demeanor considered by the jury. Thus, any solution obtained must balance the defendant's right of confrontation and the witness's right to freedom. It should be noted, however, that in any situation in which the prosecution is not allowed to use indirect testimony of prosecution witnesses, the defendant will have no interest in having the witness available. In fact, in such a situation, he will desire the absence of the incriminating witness, particularly if the witness is crucial to the establishment of a *prima facie* case against him. The defendant may also require that witnesses be available in his defense. But these witnesses may not always be cooperative. The sixth amend-

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392 U.S. 40 (1968); *Terry v. Ohio*, 392 U.S. 1 (1968). For an extensive discussion of these cases see LaFare, "*Street Encounters*," and the *Constitution: Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 39 (1968).

<sup>15</sup> See, e.g., *Blackmer v. United States*, 284 U.S. 421 (1932); *Blair v. United States*, 250 U.S. 273 (1919).

<sup>16</sup> Freedom to travel both within the United States and abroad is part of the liberty protected by the fifth and fourteenth amendments. See *United States v. Guest*, 383 U.S. 745, 758 (1966); *Zemel v. Rusk*, 381 U.S. 1, 14 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500, 505-06 (1964); *Edwards v. California*, 314 U.S. 160 (1941). See also, *New York v. O'Neill*, 359 U.S. 1 (1959).

<sup>17</sup> U. S. CONST. amend VI, made applicable to the state by the fourteenth amendment. See *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

<sup>18</sup> See *Barber v. Page*, 390 U.S. 719 (1968), held to be retroactive in *Berger v. California*, 89 S.Ct. 540 (1969).

ment recognizes the importance of this interest by giving the accused the right "to have compulsory process for obtaining witnesses in his favor."<sup>19</sup> Just how far the right extends, however, is unclear. Most states do not grant statutory authority to the defendant to serve witnesses,<sup>20</sup> and some courts have held that the right to subpoena does not include extraterritorial service.<sup>21</sup> Whether the defendant's ability to compel a witness to attend trial should be the same as that of the prosecution<sup>22</sup> depends on a balance of the relative interests of all three parties.

## II. THE WITNESS'S DUTY TO TESTIFY

Before examining the most serious deprivation of liberty with which this Comment is concerned—involuntary confinement prior to any violation of law—it is necessary to examine the scope of the duty of a witness to testify and the general process by which the state can deter neglect of that duty. For it is in the law recognizing the individual's duty to testify that one finds the basis for all statements assuming the constitutionality of restrictions on a witness.<sup>23</sup>

The duty of an individual to appear as a witness and testify to matters within his knowledge when summoned by a judicial or legisla-

<sup>19</sup> U.S. CONST. amend VI. For a discussion of the historical evolution of compulsory process for the defendant see 8 WIGMORE §2190. See also *Washington v. Texas*, 388 U.S. 14 (1967), which made the right binding upon the states.

Nevertheless, the defendant's right is far from absolute. See, e.g., *Maguire v. United States*, 396 F.2d 327, 330 (9th Cir. 1968): "The Sixth Amendment does not require that the government be successful in trying to subpoena witnesses—all that is required is that the process issue and the Marshal exercise due diligence in a good faith attempt to secure service of process" (citations omitted). See also *Barber v. Page*, 390 U.S. 719 (1968), which required a "good-faith effort," *id.* at 725, to secure the presence of out-of-state prosecution witnesses. Startlingly, state courts have not interpreted this decision as requiring a similar effort when the witnesses are sought solely by the defense. *People v. Cavanaugh*, 444 P.2d 110, 112-13, 70 Cal. Rptr. 438, 441 (1968); *Commonwealth v. Durring*, 238 N.E.2d 508, 512 (Mass. 1968) (no mention of *Barber* in opinion). Despite the clear language in each case, however, the results could be explained on other grounds. In *Cavanaugh*, the state did produce 2 of 11 requested alibi witnesses, the trial judge ruled that the testimony of the others would be merely cumulative, and their responses to written interrogatories were read at trial. 444 P.2d at 113-14, 70 Cal. Rptr. at 442-44. In *Durring*, the request for production of 32 witnesses from various states was not made until the 5th day of trial, and counsel, when questioned, stated that the testimony "would be primarily hearsay." 238 N.E.2d at 512.

<sup>20</sup> See note 42 *infra*.

<sup>21</sup> *People v. Cavanaugh*, 444 P.2d 110, 70 Cal. Rptr. 438 (1968); *Commonwealth v. Durring*, 238 N.E.2d 508 (Mass. 1968). Although the UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT THE STATE IN CRIMINAL PROCEEDINGS [hereinafter cited as UNIFORM WITNESS ACT] has been enacted in 45 states, the District of Columbia, the Canal Zone, Puerto Rico, and the Virgin Islands, 9 UNIFORM LAWS ANN. 50 (Supp. 1967), if the state cases cited above were followed literally, it could be used exclusively for the production of prosecution witnesses.

<sup>22</sup> For a discussion of the inequality between defense and prosecution because of the power of the state to grant witnesses immunity from prosecution without affording similar privileges to the defense, see Note, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 953 (1967).

<sup>23</sup> See, e.g., *New York v. O'Neill*, 359 U.S. 1, 7 (1959).

tive tribunal is clearly established in our law.<sup>24</sup> This undoubtedly imposes a burden on individual freedom that may require a sacrifice of time or privacy,<sup>25</sup> but such a burden is inevitable in a system of law requiring direct testimony of witnesses.<sup>26</sup> Both common law<sup>27</sup> and state statutory law recognize the duty, which was articulated and justified by the Supreme Court in *Blair v. United States*.<sup>28</sup>

[I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government . . . is subject to mitigation [only] in exceptional circumstances . . . .<sup>29</sup>

When properly served, a person can be required to come to court to testify even if it is inconvenient. In *Blackmer v. United States*,<sup>30</sup> the Supreme Court upheld the contempt conviction of Blackmer for his failure to appear and testify at a criminal trial in the District of Columbia after being served with a subpoena in France. Subject only to the specific evidentiary privileges and the right against self-incrimi-

<sup>24</sup> *Blackmer v. United States*, 284 U.S. 421 (1932); *Blair v. United States*, 250 U.S. 273 (1919) (grand jury). See generally 8 WIGMORE §§2190-93; 97 C.J.S. *Witnesses* §2 (1957). The duty to testify applies to civil as well as criminal cases. See, e.g., *Dixon v. People*, 168 Ill. 179, 48 N.E. 108 (1897).

<sup>25</sup> See, e.g., 8 WIGMORE §2192, at 72.

<sup>26</sup> Professor Wigmore finds the duty necessitated by "justice as an institution and . . . law and order as indispensable elements of civilized life." *Id.* 73. "It is a duty not to be grudged or evaded. Whoever is impelled to evade or to resent it should retire from the society of organized and civilized communities, and become a hermit." *Id.* 72.

<sup>27</sup> The use of compulsion to force a witness to testify was for a long time unknown to the common law. Sir William Holdsworth notes, "As late as 1455 it was said in argument that 'no one can compel another to swear with him.'" 9 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 180 (1926), quoting Y. B. Hil. 33 Hen. 6, pl. 23 (1455). But Chancery had developed the subpoena in the 14th century, and by the 16th it was being freely borrowed by the King's Council and the common law courts. 9 W. HOLDSWORTH, *supra*, at 184-85. The Act of 1562-63, 5 Eliz. 1, c. 9, §12, subjected a witness in a civil case who failed to appear and testify to a penalty and made him liable to suit by the party injured by his default. See generally 8 WIGMORE §2190. In the United States, the duty is as old as the country: "By the first Judiciary Act [Judiciary Act of 1789, c. 20, §30, 1 Stat. 88, the] duty to appear and testify was recognized." *Blair v. United States*, 250 U.S. 273, 280 (1919).

<sup>28</sup> 250 U.S. 273 (1919).

<sup>29</sup> *Id.* at 281 (citations omitted).

<sup>30</sup> 284 U.S. 421 (1932).

nation,<sup>31</sup> an individual can be compelled to tell whatever he knows and to produce documents.<sup>32</sup>

The general process used to compel the attendance of a witness is the issuance of a subpoena *ad testificandum*. The sanction behind the subpoena is the power of the court to punish improper failure to appear in response as contempt of court.<sup>33</sup> In addition to the possibility of a contempt citation, an individual who breaches his duty to testify in response to a subpoena may be subject to a civil suit by the party who has been harmed by the breach.<sup>34</sup>

When a witness fails to appear in response to a subpoena, a court in its discretion may order his "attachment," that is, arrest him to compel his attendance.<sup>35</sup> But where it appears that the subpoena will not suffice to assure attendance, the court may order the arrest of the witness without issuing any subpoena at all. It is this power, the existence of which was recognized in *Barry v. United States ex rel. Cunningham*,<sup>36</sup> that subjects the witness to a particularly serious deprivation

<sup>31</sup> In addition to the right against self-incrimination, U.S. CONST. amend V, the witness need not testify if he can invoke the evidentiary privileges. See, e.g., C. MCCORMICK EVIDENCE §§ 82-90 (husband-wife), 101-08 (doctor-patient), 91-100 (attorney-client) (1954). Generally, however, the privileges excuse only testimony; the witness must still appear to claim the privilege. See 8 WIGMORE § 2197. Even the privilege against self-incrimination will not excuse the witness from testifying if he is granted immunity from prosecution. See, *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964).

<sup>32</sup> See, e.g., *Wilson v. United States*, 221 U.S. 361, 372 (1911).

<sup>33</sup> A contempt charge requires ability to comply. *Bickley v. Commonwealth*, 25 Ky. (2 J.J. Mar.) 572, 574 (1829) discussed in text at note 93 *infra*. See generally 17 C. J. S. Contempt § 19, (1963).

<sup>34</sup> 8 WIGMORE § 2195f; 58 AM. JUR. Witnesses § 888 (1948).

<sup>35</sup> See, e.g., *Lyons v. Lyons*, 279 Ala. 329, 331, 185 So.2d 121, 122-23 (1966); cf., e.g., *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929) (power of Senate to issue warrant); *McGrain v. Daugherty*, 273 U.S. 135, 180 (1927) (same).

<sup>36</sup> 279 U.S. 597 (1929). Although the *Barry* case actually involved the power of the Senate to issue a warrant for a witness when acting as judge of election returns, the Court assumed that a court would have the same power as the Senate. "[A] court has power in the exercise of a sound discretion to issue a warrant of arrest without a previous subpoena when there is good reason to believe that otherwise the witness will not be forthcoming." *Id.* at 616.

Perhaps more serious is the situation in which the arrest is made without a warrant by the police. In *State v. Hand*, 101 N.J. Super. 43, 242 A.2d 888 (1968) a woman was arrested without a warrant as a material witness against her husband. She was subsequently examined with a police doctor and charged with being under the influence of narcotics. She moved to suppress the doctor's testimony on the ground that her arrest as a material witness was illegal. The court found "the common law to be that a peace officer may arrest without a warrant when he has reasonable basis or probable cause to believe a person is a necessary and material witness to a crime punishable by imprisonment for more than one year and that person might be unavailable for service of subpoena." *Id.* at 56, 242 A.2d at 895. The court used as its authority the common law of arrest in New Jersey, which allows arrest on probable cause to believe that specified crimes have been or are being committed and that the person arrested is the perpetrator. It argued that it was not precluded from reaching this result by the New Jersey statutes providing for the posting of bond by witnesses to assure appearance, since they made no provision for the manner of the witness's apprehension.

The court decided that, even though it is a "subjective judgment," an officer could determine whether a witness was necessary and material and would be un-

of liberty, since it permits his incarceration before he has misbehaved in any way.<sup>37</sup>

The process of securing the attendance of witnesses and punishing recalcitrant witnesses who are needed at a trial or other judicial proceeding has been facilitated by the widespread adoption of the Uniform Act To Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.<sup>38</sup> This law should silence the cry of many courts that a witness is likely to leave the state and be forever free from service of its process.<sup>39</sup> It does not, however, solve the problem created by a hiding witness who cannot be located. In substance it provides that any judge of a court of record may certify that an individual is a material witness in a criminal prosecution or grand jury investigation in that state. A judicial hearing will then be held in the state where the witness is found. If the judge determines at this hearing that the witness is material and necessary, that no undue hardship will result from compelling him to attend and testify, and that he will not be subject to arrest or service of process in the other state, the judge will issue a summons directing the witness to attend and testify. If the witness does not attend as ordered, he can be punished through the contempt power of the state ordering his attendance.<sup>40</sup>

There is one further sanction against witnesses who seek to avoid testifying. The Federal Fugitive Felon Act<sup>41</sup> enacted by Congress in order to aid states in law enforcement, makes it a federal crime to travel in interstate commerce to avoid testifying in major state criminal proceedings.

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available. *Id.* at 57, 242 A.2d at 895-96. In the case before the court, however, the arresting officers did not have probable cause for their determination of these factors. The entire discussion was unnecessary to the decision, because, as the court itself said, "an arrest may not be used as a pretext to search for evidence," which is what was found as a fact in the case. *Id.* at 58, 242 A.2d at 896 (quoting *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932)).

<sup>37</sup> See discussion in text accompanying notes 98-112 *infra*.

<sup>38</sup> See note 21 *supra*. The act was upheld against constitutional challenge in *New York v. O'Neill*, 359 U.S. 1 (1959), the Court relying heavily on *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929). See text accompanying note 36 *supra*.

<sup>39</sup> See *Crosby v. Potts*, 8 Ga. App. 463, 468, 69 S.E. 582, 584 (1910). The widespread adoption of this statute has been an influential factor in the Supreme Court's right-to-confrontation decisions. See *Barber v. Page*, 390 U.S. 719, 723 n.4 (1968).

<sup>40</sup> The description above assumes that both states have adopted the Uniform Witness Act.

<sup>41</sup> 18 U.S.C. § 1073 (1964):

Whoever moves or travels in interstate or foreign commerce with intent . . . (2) to avoid giving testimony in any criminal proceeding in such place in which the commission of an offense punishable by death or which is a felony under the laws of such place, or which in the case of New Jersey, is a high misdemeanor under the laws of said State, is charged, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

The act was held constitutional in *Hemans v. United States*, 163 F.2d 228 (6th Cir.), *cert. denied*, 332 U.S. 801 (1947), despite contentions that it violated the right of free ingress and egress.



## III. DEPRIVATION OF A WITNESS'S LIBERTY PRIOR TO DISOBEDIENCE

## A. State Statutes

Every state provides that a prosecution witness<sup>42</sup> who is "necessary and material"<sup>43</sup> to a criminal proceeding in the state may be required to execute a recognizance for his appearance.<sup>44</sup> As an incident of this power, courts have the authority to issue an arrest warrant in case of noncompliance. Most states also allow courts to require bond from a witness, and in many of these the witness may be imprisoned if he is unable or unwilling to meet the requirements.<sup>45</sup> This power to detain witnesses who cannot post bail involves a deprivation of liberty where there is not even probable cause to believe that a crime has been committed or that the individual has done it. Even the most stringent statutes require only probable cause, or reason to believe, that a wrongful act *will be* committed,<sup>46</sup> such as, failure to obey a subpoena, flight in

<sup>42</sup> A few states provide the same procedure against defense witnesses as against prosecution witnesses. *E.g.*, MISS. CODE ANN. § 1889 (1942). An early New Jersey case, *State v. Zellers*, 7 N.J.L. 220 (1824), required a defense witness to execute a recognizance, but New Jersey law now requires this only from prosecution witnesses in high misdemeanor cases. N.J. STAT. ANN. § 2A:162-2 (1953). Some statutes are ambiguous about whether they include defense witnesses. *E.g.*, IND. ANN. STAT. §§ 9-720, 9-1601 (1956); PA. R. CRIM. P. 4014. Others clearly say "against the prisoner." *E.g.*, OHIO REV. CODE ANN. § 2937.16 (Page 1953); MASS. GEN. LAWS ANN. ch. 276, 345 (1968); MINN. STAT. ANN. § 629.54 (1945).

<sup>43</sup> The precise phraseology, of course, varies from state to state; most states say only "material." The N.Y. PROPOSED CRIM. CODE § 330.20(1)(a) allows a witness to be required to post bail or be detained if he "[p]ossesses information material to the determination of [the] action."

Although a separate meaning might be inferred for the word "necessary" when it appears, there is no authority that develops such a distinction. In *State v. Hand*, 101 N.J. Super. 43, 242 A.2d 888 (1968), there was some discussion attributing a different meaning to the words, but it could hardly be called conclusive.

<sup>44</sup> See Comment, *supra* note 5, at 38. A recognizance is an "obligation of record, entered into before some court of record, or magistrate duly authorized, with condition to do some particular act; as to appear at . . . criminal court, to keep the peace, to pay a debt, or the like." BLACK'S LAW DICTIONARY 1436 (4th ed. rev. 1968). Unless specifically authorized a court cannot detain a witness for refusal to give recognizance. *Comfort v. Kittle*, 81 Iowa 179, 182, 46 N.W. 988, 989 (1890); *Bates v. Kitchel*, 160 Mich. 402, 407, 125 N.W. 684, 686 (1910). A statute that authorizes compelling a "recognizance" from the witness does not thereby authorize requiring bail or sureties. *Comfort v. Kittle*, *supra*, at 184-85, 46 N.W. at 990. The dissenting judge in that case said that recognizance "[c]ontemplates an obligation which is intended by the law to secure the attendance of the person giving it . . . . When the books speak of a recognizance, without more it is understood that bail is given." *Id.* at 185-86, 46 N.W. at 990-91. The statutes, however, follow the majority approach and say "with sureties" where more is meant. Where it is not so specified, sureties can not be required. *People ex rel. Ljubisich v. Brown*, 276 Ill. 186, 114 N.E. 583 (1916); *State v. Lane*, 11 Kan. 458 (1873).

Recognizances are also used where there is an adjournment or continuance. See *Fawcett v. Linthecum*, 7 Ohio C.C.R. 141 (1893); *State v. Lane*, 11 Kan. 458 (1873).

<sup>45</sup> Certain states require separate facilities for housing witnesses. *E.g.*, N.J. STAT. ANN. § 2A: 162-3 (1953). Recovery for breach of the statute, however, has proved virtually impossible in the absence of a statute conferring such a right. *E.g.*, *Watkins v. Board of Chosen Freeholders*, 73 N.J.L. 213, 62 A. 1134 (1906).

<sup>46</sup> A similar procedure of requiring a recognizance, bail and detention is often authorized against persons who threaten a breach of the peace. See text accompanying notes 107-09 *infra*.

interstate commerce in violation of the Federal Fugitive Act, or violation of any other law the state may have passed to punish recalcitrant witnesses.<sup>47</sup> The standard of probable cause used to arrest a person suspected of criminal conduct, may be inappropriate as a standard to detain a witness. At this point, however, it is important to note that state law often allows detention of witnesses in the absence of even minimal showing.

The test for determining which witnesses may be required to post bond differs among the states. Some states require only a showing that the witness is material;<sup>48</sup> others require in addition a showing that the witness is unlikely to appear unless security is posted or that it will be "impracticable" to secure the appearance of the witness by subpoena.<sup>49</sup> New York is in the first category, requiring merely that the witness be "necessary and material."<sup>50</sup> New York courts have regarded the factor of likelihood of flight only in setting the amount of bail and not in determining whether bail should be required at all.<sup>51</sup>

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<sup>47</sup> There has been little attempt to increase penalties for noncompliance with a subpoena rather than requiring prior security. *But see* ILL. ANN. STAT. ch. 38, § 109-3(d) (Smith-Hurd Supp. 1969):

If the defendant is held to answer the judge may require any material witness for the State or defendant to enter into a written undertaking to appear at the trial, and may provide for the forfeiture of a sum certain in the event the witness does not appear at the trial. Any witness who refuses to execute a recognizance may be committed by the judge to the custody of the sheriff until trial.

<sup>48</sup> *See, e.g.*, N.Y. CODE CRIM. PROC. § 618-b (McKinney 1958).

<sup>49</sup> *See, e.g.*, MICH. COMP. LAWS § 767.35 (1968) (emphasis added):

Whenever it shall appear to any court of record that any person is a material witness in any criminal case pending of any court of the county and that *there is danger of the loss of testimony* of such witness unless he be required to furnish bail or be committed in the event that he fails to furnish such bail, said court . . . shall require such witness to be brought before him and after giving him an opportunity to be heard, if it shall appear that such witness is a material witness and that there is *danger of the loss of his testimony* . . . said court may require such witness to enter into recognizance with such sureties and in such amount as the court may determine for his appearance at any examination or trial of said cause. All witnesses who fail to so recognize shall be committed to jail by said court, there to remain until they comply with such order or are discharged by future order . . . .

The words emphasized could easily be read to require bail or detention where the witness himself has indicated no intent to refuse to appear, but where others might prevent his attendance. Other statutes use words such as "cause to believe that a witness will not perform the condition of his recognizance." MASS. GEN. LAWS ANN. ch. 276, § 47 (1968). To the same effect *see* MINN. STAT. ANN. § 629.54 (1947).

<sup>50</sup> N.Y. CODE CRIM. PROC. § 618-b (McKinney 1958). Although the statute was once held unconstitutional, because it did not require a showing that the witness will not respond to a subpoena, *People ex rel. Maloney v. Sheriff of Kings County*, 117 Misc. 421, 424, 192 N.Y.S. 553, 554 (Sup. Ct. 1921), this case has not been followed. *People ex rel. Farina v. Wallis*, 208 App. Div. 720, 202 N.Y.S. 945 (1924) (mem.); *People ex rel. Ditchik v. Sheriff of Kings County*, 171 Misc. 248, 251, 12 N.Y.S.2d 341, 344 (Sup. Ct.), *aff'd mem.*, 256 App. Div. 1081, 12 N.Y.S.2d 232 (1939); *People ex rel. Bruno v. Maudlin*, 123 Misc. 906, 206 N.Y.S. 523 (Sup. Ct. 1924); *see* 5 SYRACUSE L. REV. 213 (1954).

<sup>51</sup> *O'Connell v. McElhiney*, 138 N.Y.S.2d 138 (Sup. Ct. 1954) (flight "unlikely"; \$50,000 bail for witness "excessive").

Some liberalization is attempted in its proposed new Code of Criminal Procedure. The applicable sections require a showing that the witness "[w]ill not be amenable or responsive to a subpoena at a time when his attendance will be sought" before a court can issue a "material witness order" requiring the witness to post bail.<sup>52</sup>

The power to require a witness to secure his future appearance is authorized at different stages of a criminal proceeding in the several states. Under some statutes the material witness cannot be required to furnish bail or be detained in its absence until "the prisoner is admitted to bail or committed by a magistrate";<sup>53</sup> under others there need only be a criminal proceeding "pending"<sup>54</sup> and, in at least one case, it was held lawful to detain a witness for four months before the suspect was apprehended.<sup>55</sup> Those statutes which allow the proceeding against the witness to begin before the defendant is apprehended<sup>56</sup> are open to particularly serious abuse, as they can be used to detain suspects (as "witnesses") where there is no probable cause to make an arrest, and, in any event, can result in a long period of needless detention for a witness even if no defendant is ever arraigned.<sup>57</sup> New York's proposed statute contains a list of three situations in which a "material witness order" may be issued.<sup>58</sup> One of these is when a "felony complaint" is

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1. A material witness order may be issued upon the ground that there is reasonable cause to believe that a person whom the people or the defendant desire to call as a witness in a pending criminal action:

(a) Possesses information material to the determination of such action; and

(b) Will not be amenable or responsive to a subpoena at a time when his attendance will be sought.

2. A material witness order may be issued only when:

(a) An indictment has been filed in a superior court and is currently pending therein; or

(b) A grand jury proceeding has been commenced and is currently pending; or

(c) A felony complaint has been filed with a local criminal court and is currently pending therein.

N.Y. PROPOSED CRIM. CODE § 330.20.

<sup>53</sup> See, e.g., IND. ANN. STAT. § 9-720 (1956); PA. R. CRIM. P. 4014.

<sup>54</sup> E.g., MICH. COMP. LAWS § 767.35 (1968); N.Y. CODE CRIM. PROC. § 618-b (McKinney 1968).

A "pending" criminal proceeding apparently includes a grand jury investigation, *in re Prestigiacomo*, 234 App. Div. 300, 255 N.Y.S. 289 (1932) (dictum), but not a district attorney's investigation, *People v. Doe*, 261 App. Div. 504, 26 N.Y.S.2d 458 (1941) (dissenting opinion).

<sup>55</sup> *In re Grzyeski*, 267 Mich. 697, 255 N.W. 359 (1934).

<sup>56</sup> E.g., MASS. GEN. LAWS ANN. ch. 276, § 49 (1968): "Upon a complaint or indictment for a felony, against a defendant not in custody, a material witness committed for failure to furnish sureties upon his own recognizance may be held in custody for a reasonable time, pending the pursuit and apprehension of the defendant."

<sup>57</sup> Cf. PA. R. CRIM. P. 4014, comment: "Rule is not intended to permit a witness being detained prior to arrest, as such arrest may never take place."

<sup>58</sup> See note 52 *supra*.

pending. This would apparently allow a witness to be required to post bail or be detained even before a grand jury is convened.<sup>59</sup>

The obvious question raised by these procedures is why a witness should be required to give *any* security for his appearance before it is shown that he is likely not to appear. Asking this very question,<sup>60</sup> the Supreme Court of Minnesota in 1872 construed the Minnesota statute to require a showing of "intention of not appearing and testifying when duly subpoenaed,"<sup>61</sup> adding that judicial discretion to require detention could certainly not be exercised in a contrary manner.

If, for instance, it would be unjust or oppressive, and against common law and common right, as it certainly would be . . . to commit such material witness in default of bail, without any proof that he had any intention of not appearing and testifying when duly subpoenaed, but who is too poor to render his recognizance of any value, or too friendless to be able to give bail, in what sense could it be said, that in the exercise of a sound legal discretion, the court could be warranted in so doing; or what interest of the state requires the incarceration of such a person? Certainly none.<sup>62</sup>

It seems more than likely that high bail is sometimes set to serve one of two purposes not mentioned in the statutes: to detain—and thereby protect—a witness who may be in danger, or to isolate him from those who might seek to buy his testimony. These practices, however, are rarely admitted,<sup>63</sup> and none of the witness statutes allows bail to be set for any purpose other than to assure appearance. But a glance at the cases will reveal that bail is often set with the knowledge that it cannot be met, obviously for the purpose of detention.<sup>64</sup> Although some cases make no distinction between those witnesses who are unwilling and those who are unable to post bail,<sup>65</sup> such a distinction is

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<sup>59</sup> See Comment, *supra* note 5, at 38 n.7. Although the requirement of recognizance is mandatory in some states and discretionary in others, no significance can be attached to this factor since in every case the magistrate or judge must first determine that the witness is material—a criterion that requires itself an exercise of discretion. Furthermore, in most cases, the judge has discretion whether or not to require bail, and to set the amount of bail if required.

<sup>60</sup> State *ex rel.* Howard v. Grace, 18 Minn. 398, 403-04 (1872).

<sup>61</sup> *Id.* at 403.

<sup>62</sup> *Id.* at 403-04 (citations omitted).

<sup>63</sup> But see 8A J. MOORE, FEDERAL PRACTICE ¶46.11, at 46-51 (1968), stating: "the original purpose of material witness proceedings . . . was to obtain *protective custody* of the witness pending trial" (emphasis in original).

<sup>64</sup> See, e.g., text accompanying note 84 *infra*.

<sup>65</sup> Compare Markwell v. Warren County, 53 Iowa 422, 5 N.W. 570 (1880) (witness unable to post bond not entitled to witness fee for period of detention) with Hall v. County Comm'rs, 82 Md. 618, 34 A. 771 (1896) (opposite result) and with *Ex parte Sheppard*, 43 Tex. Crim. 372, 66 S.W. 304 (1902) (witness unable to give security must be released on recognizance).

made in a few state statutes,<sup>66</sup> and some courts have used their discretion to release indigent witnesses on their own recognizance.<sup>67</sup>

A limitation on the power of the state to detain witnesses is imposed by certain state constitutions that prohibit unreasonable detention of witnesses.<sup>68</sup> But these state constitutional guarantees have been for the most part of little force.<sup>69</sup> An exception is that found in the Colorado Constitution which specifically limits detention of witnesses to the period necessary to take a deposition.<sup>70</sup>

### B. Federal Law

The federal law applicable to witnesses in federal courts provides a significant contrast to many state laws. Material witnesses, both for

<sup>66</sup>In Arizona, a witness who cannot give security must be examined conditionally within three days and released. ARIZ. REV. STAT. ANN. §13-1843(b) (1956). In Massachusetts, "if the court or justice finds that the witness . . . is unable to procure sureties when so ordered, he shall, *except in cases of felony*, be discharged upon his own recognizance." MASS. ANN. LAWS ch. 276, §49 (1968) (emphasis added). In Minnesota, "except in case of murder in the first degree, arson where human life is destroyed, and cruel abuse of children, [a magistrate] shall not commit any witness who shall offer to recognize, without sureties, for his appearance." MINN. STAT. ANN. §629.54 (1947).

<sup>67</sup>*E.g.*, United States v. Lloyd, 26 F. Cas. 984 (No. 15,614) (C.C.S.D.N.Y. 1860).

Requiring bail that a witness is unable to meet of course raises most of the questions that have been asked about the constitutionality of the money bail (or ransom) system in the United States. To say the least, the questions are serious; the literature on the subject is voluminous. See, e.g., D. FREED & P. WALD, BAIL IN THE UNITED STATES (1964); R. GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM (1965); Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959 (1965). For citations to most of the literature, see Note, *Tinkering with the California Bail System*, 56 CALIF. L. REV. 1134 (1968).

In New York v. O'Neill, 359 U.S. 1, 8 (1958), the Supreme Court noted that the Florida statute in question did not provide for the release of witnesses on bail, but declined to consider the questions raised because the record showed no evidence that release on bail had ever been sought and denied. For a state case holding that \$250,000 bail was not excessive for a witness held over three months, see *People ex rel. Rao v. Adams*, 296 N.Y. 231, 72 N.E.2d 170 (1947).

<sup>68</sup>*E.g.*, CAL. CONST. art. 1, §6; MICH. CONST. art. 1, §16; N.Y. CONST. art. 1, §5.

<sup>69</sup>Compare *People ex rel. Rao v. Adams*, 296 N.Y. 231, 72 N.E.2d 170 (1947) (\$250,000 bail not excessive for witness detained over three months) with N.Y. CONST. art. 1, §5 ("Excessive bail shall not be required . . . nor shall witnesses be unreasonably detained."). California, however, has given more weight to similar provisions. *E.g.*, *Ex parte Dressler*, 67 Cal. 257, 7 P. 645 (1885); *Ex parte Shaw*, 61 Cal. 58, 59 (1882).

<sup>70</sup>

No person shall be imprisoned for the purpose of securing his testimony in any case longer than may be necessary in order to take his deposition. If he can give security he shall be discharged; if he cannot give security his deposition shall be taken by some judge of the supreme, district or county court, at the earliest time he can attend, at some convenient place by him appointed for that purpose, of which time and place the accused and the attorney prosecuting for the people shall have reasonable notice. The accused shall have the right to appear in person and by counsel. If he have no counsel, the judge shall assign him one in that behalf only. On the completion of such examination the witness shall be discharged on his own recognizance, . . . but such deposition shall not be used if in the opinion of the court the personal attendance of the witness might be procured by the prosecution, or is procured by the accused.

COLO. CONST. art. 2, §17.

the prosecution and the defendant, are covered by the Bail Reform Act of 1966<sup>71</sup> which was intended to make detention the exception rather than the rule.<sup>72</sup> Restrictions can be imposed on a material witness<sup>73</sup> if it is shown that "it may become impracticable to secure his presence by subpoena."<sup>74</sup> In that event the witness is subject to the provisions of the Act applicable to defendants, and the judge is directed to impose the least of a graded series of restrictions that "will reasonably assure [his] appearance,"<sup>75</sup> including supervision and restriction on travel or living situs as well as personal security and bail.<sup>76</sup>

The Bail Reform Act also provides that "[n]o . . . witness shall be detained because of inability to comply with any condition of release if [his] testimony . . . can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice."<sup>77</sup> A number of early state cases employed this alternative,<sup>78</sup> which is provided by statute or constitution in several states. Exemplary procedures are found in Colorado<sup>79</sup> and Arizona.<sup>80</sup> In contrast to either the federal model or one of the liberal state models, the proposed New York statute limits the means of securing attendance to the imposition of some form of bail, and makes no provision for examining a witness

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<sup>71</sup> 18 U.S.C. §§ 3146-52 (Supp. III, 1968). Prior to the Bail Reform Act, detention of witnesses in the federal courts was governed by FED. R. CRIM. P. 46(b), which gave the court power to require bail of a material witness upon a showing "that it may become impracticable to secure his presence by subpoena." If the witness failed to make bail he could be detained and bail "was almost invariably set in amount beyond [the witness's] resources to insure his detention pending trial." 8A J. MOORE, FEDERAL PRACTICE ¶46.11, at 46-51 (1968).

<sup>72</sup> See 2 U.S. Code Cong. & Ad. News 2295-99 (1966).

<sup>73</sup> The statute does not distinguish prosecution from defense witnesses, although courts may.

<sup>74</sup> 18 U.S.C. § 3149 (Supp. III, 1968).

<sup>75</sup> 18 U.S.C. § 3146 (Supp. III, 1968).

<sup>76</sup> *Id.* The judge may:

(1) place the person in the custody of a designated person or organization agreeing to supervise him;

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond . . .

(4) require the execution of a bail bond with sufficient solvent sureties . . .

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

<sup>77</sup> 18 U.S.C. § 3149 (Supp. III, 1968). In addition, § 3150(3) imposes a penalty of not more than \$1000 or imprisonment for not more than 1 year, or both, for willful failure to appear after release.

<sup>78</sup> See, e.g., *People v. Lee*, 49 Cal. 37 (1874); *State v. Kemp*, 124 La. 85, 49 So. 987 (1909).

<sup>79</sup> COLO. CONST. art. 2, § 17, quoted note 70 *supra*.

<sup>80</sup> ARIZ. REV. STAT. ANN. 13-1843(b) (1956). In Massachusetts, depositions may be taken with the consent of defendant. MASS. GEN. LAWS ANN. ch. 276, § 50 (1968).

to reduce the period of possible detention.<sup>81</sup> Failure to provide for mandatory examination and release may be due to the fact that a witness can be detained before a suspect is apprehended;<sup>82</sup> examination by defense counsel would obviously be impossible in such circumstances.

No doubt many arrangements are informally made between witnesses and prosecutors in which witnesses agree to certain restrictions on their liberty. They may do so out of fear for their own safety, or because pressure is exerted upon them by the prosecutor. The prosecutor's leverage to force such a "voluntary" agreement will in turn reflect the strictness of the state's witness policy. It is also possible that judges confronted with a general statute will release witnesses on their own recognizance or with alternative restrictions such as orders not to leave the state.

A timely illustration of the procedure at stake is seen in the case of *State ex rel. Stephens v. Luttrell*.<sup>83</sup> Charles Quitman Stephens was a central witness to Martin Luther King's murder. By agreement with the prosecutor's office, Stephens first willingly stayed in jail, free to come and go with a guard. Fearing for his safety, the state invoked its material witness statute,<sup>84</sup> and the court set bail at \$10,000, which Stephens could not meet. He was thus confined in jail, where he was allowed no visitors.<sup>85</sup> His petition for habeas corpus was granted, and he was released on condition that he "remain within the jurisdiction of Shelby County, Tennessee . . . and submit to police protection."<sup>86</sup> The judge hearing the petition noted that Stephens was not uncooperative and had not indicated that he "intended to leave the jurisdiction."<sup>87</sup>

### C. The Common Law

Since every state now provides by statute for some form of pretrial detention of witnesses,<sup>88</sup> whether or not the common law authorized such detention before a prospective witness disobeyed a subpoena might seem only of historical importance. Since there may be areas not covered by the statutes, and since questions of judicial interpretation arise because of imprecise language, the common law of witness detention is still worth examination.

American courts that have considered the issue have generally held that there is no common-law power to detain a witness before he has

<sup>81</sup> See N.Y. PROPOSED CRIM. CODE, §§ 330.50, 330.60.

<sup>82</sup> *Id.* § 330.20(2)(c). See note 52 *supra*.

<sup>83</sup> No. 13997 R.D. (Cir. Ct. Shelby County, Tenn., Aug. 21, 1968).

<sup>84</sup> TENN. CODE ANN. §§ 40-1122 to -27 (1955).

<sup>85</sup> TIME, Sept. 13, 1968, at 70-71.

<sup>86</sup> No. 13997 R.D. (Cir. Ct. Shelby County, Tenn., Aug. 21, 1968).

<sup>87</sup> *Id.*

<sup>88</sup> Possibly through an oversight, the Indiana statute allows recognizance (with or without sureties) to be required, but is silent on detention. IND. ANN. STAT. §§ 9-720, 9-1601 (1956).

misbehaved.<sup>89</sup> In almost all of the cases upon which this conclusion is based, however, there was an existing material witness statute authorizing bail and detention, but the proceeding involved did not appear to fit under the statute. The courts in such circumstances have construed the statutes strictly, considering the requirement of sureties "the exercise of an unusual and extraordinary power [which] should not be exercised where authority is doubtful."<sup>90</sup>

The power to require persons, without accusation of wrong, and without a hearing to give even their own pledge for their appearance as witnesses, is surely an extraordinary power, and still more extraordinary when security may be required and imprisonment imposed for a failure to give it. The power to bind witnesses by recognizance to appear and give evidence has long since been conferred upon courts and judges, by the statutes of many, if not all of the states. We are not aware that it has ever been exercised in the absence of statutory authority.<sup>91</sup>

Another example of this attitude is *Bickley v. Commonwealth*,<sup>92</sup> where the witness had already failed to comply with a subpoena. Since the statute authorized only recognizance and not security, the court held that the attempt to recognize him with sureties was invalid. "Before such a doctrine can be tolerated by us, a positive grant of the power by the legislature must be shown . . . ." <sup>93</sup>

One state court, however, did find a common-law power to detain a witness if a subpoena and the threat of contempt appear inadequate. In *Crosby v. Potts*,<sup>94</sup> the court reasoned that such a power was a logical extension of the power to compel the attendance of witnesses. The justification for this position (expressed by a court that had no statutory authority to commit witnesses<sup>95</sup>) was the fear that the witness would leave the state and "once he has crossed the state line, he [would

<sup>89</sup> *Comfort v. Kittle*, 81 Iowa 179, 46 N.W. 988 (1890); *Bickley v. Commonwealth*, 25 Ky. (2 J.J. Mar.) 572 (1829); *Bates v. Kitchel*, 160 Mich. 402, 407, 125 N.W. 684, 686 (1910); *State v. Hand*, 101 N.J. Super. 43, 51, 242 A.2d 888, 892 (1968); *Little v. Territory*, 28 Okla. 467, 114 P. 69 (1911); see Comment, *Confining Material Witnesses in Criminal Cases*, 20 WASH. & LEE L. REV. 164 (1963).

<sup>90</sup> *Comfort v. Kittle*, 81 Iowa 179, 183-84, 46 N.W. 988, 989 (1890).

<sup>91</sup> *Id.* at 181-82, 46 N.W. at 989.

<sup>92</sup> 25 Ky. (2 J.J. Mar.) 572 (1829).

<sup>93</sup> *Id.* at 574.

<sup>94</sup> 8 Ga. App. 463, 69 S.E. 582 (1910); cf. *State ex rel. Gebhardt v. Buchanan*, 175 So.2d 803 (Fla. Dist. Ct. App. 1965), which involved an accomplice held as a material witness after he had confessed to his part in a murder and had been promised immunity from prosecution in exchange for his testimony. Detention of an accomplice rests on other grounds. Until his obligation to testify has been fulfilled, he remains a person accused of crime. *Ex parte Carter*, 62 Tex. Crim. 113, 136 S.W. 778 (1911); *Ex parte Greenshaw*, 41 Tex. Crim. 278, 53 S.W. 1024 (1899).

<sup>95</sup> This is no longer the case. GA. CODE ANN. § 27-410 (1953) allows a court to require bond of witnesses when a defendant has been bound over for trial.



be] beyond the grasp of any of the court's processes to bring him to the trial or to punish him for his refusal to answer to a subpoena."<sup>96</sup> This reasoning has been largely eroded by the Uniform Witness Act,<sup>97</sup> and presents little justification for detaining a witness either by common law or by statute.

#### *D. Preventive Justice*

The indefinite detention of an individual innocent of any crime almost certainly offends the average citizen's sense of fair play far more than the detention of a person arrested on "probable cause" and charged with committing a crime.<sup>98</sup> Since there is more than a possibility that one accused has committed an offense against society, it is not too hard to rationalize restrictions on his liberty. But one cannot so easily assuage his conscience over the incarcerated witness. A federal court sitting in 1860 eloquently articulated the fundamental harshness of such detention.<sup>99</sup> Despite such early awareness the witness today can hope for little more than was granted the witness in 1860—possible release by a compassionate judge. Only in recent years has there been any tightening of the standards for detention and some movement toward granting relief to witnesses who cannot post bail by requiring that depositions be taken and witnesses released.<sup>100</sup>

<sup>96</sup> 8 Ga. App. at 468, 69 S.E. at 584.

<sup>97</sup> See notes 38-40 *supra* and accompanying text.

<sup>98</sup> See *Livermore et al.*, *supra* note 1, at 78:

[W]e can by reason of his guilt distinguish the criminal from others whom we loathe to confine. He voluntarily flouted society's commands with an awareness of the consequences. Consequently, he may serve utilitarian purposes without causing his prisoners any moral twinge.

See generally *id.* 75-78.

<sup>99</sup>

These laws afford no exemption for the aged, or the feeble, or those who, from infirmities of body or mind, are dependent on the attention and the services of others, or who must be separated by such arrest or detention, from the most stringent calls of their own business, or from supplying help or solace to their families or friends . . . None but those who can furnish competent bail, that is, who have the command of money or credit, can exonerate themselves from instantaneous incarceration for an indeterminate period of time, and, from being imprisoned no less absolutely . . . than if abandoned culprits. This cruel exaction not only falls upon and overpowers the citizen at home . . . but, in practice, a stranger on a journey, or pursuing his occupations away from his residence or family, is equally subject to instant arrest and imprisonment, if he knows, or is supposed to know, facts connected with a criminal transaction by an accused party, with whom he may have no connection other than perhaps accidental knowledge of some particular which may tend to convict the suspected party of having committed a criminal offense. It is to be apprehended, moreover, that this oppressive power is not always exercised with the most prudent precaution, or kept in force only during the shortest period possible to secure to the government the benefit of testimony thus sought for; but prosecutions are allowed to be procrastinated, under trivial excuses, so as to cause deeper wrongs and injuries to the witness than is reasonably necessary.

*United States v. Lloyd*, 26 F. Cas. 984, 985 (No. 15,614) (C.C.S.D.N.Y. 1860).

<sup>100</sup> The most commendable attempts at reform are no doubt the Bail Reform Act of 1966, see 18 U.S.C. § 3149 (Supp. III, 1968), and the Illinois statute, ILL. ANN. STAT. ch. 38, § 109-3(d) (Smith-Hurd Supp. 1969), as well as statutes already discussed that make exceptions for persons unable to make bail.

That some intrusion into individual freedom is constitutionally permissible seems clear.<sup>101</sup> A citizen may be required to serve on a jury and be locked up for days; the Supreme Court has upheld "stop and frisk" laws;<sup>102</sup> a witness must comply with a subpoena<sup>103</sup> and, indeed, the sixth amendment expressly provides for compulsory process. But all of these limitations on freedom, often cited as justifications for upholding the detention of witnesses,<sup>104</sup> are distinguishable from the problem of detention of witnesses. Only jury duty entails confinement, and the confinement is not in a prison. The other restrictions are considerably less severe.

The requirement that an individual secure his appearance as a witness through bail or detention is a deprivation of personal freedom in order to assure future conduct. It is, unlike the jury lock-up, not necessary for the present performance of the witness's duty to appear and testify. The requirement of security, however, depends upon the court's prediction of the witness's future behavior—whether or not he will appear at trial. Such an imposition on personal liberty because of a fear of future misbehavior is not unknown to the law: civil commitment of the mentally ill is often based on precisely such a prediction of future misbehavior. Some of the justifications for civil commitment have recently come under attack,<sup>105</sup> discussion of which is beyond the scope of this Comment. But one crucial difference must be noted: the predictions in such cases are at least based on psychiatric testimony concerning the present mental state of the person to be detained.<sup>106</sup>

In addition to civil commitment of the mentally ill, an imposition on personal liberty to control future conduct is made in two other areas: the bail process for those accused of crime, which has been discussed above,<sup>107</sup> and the now rare requirement of security to prevent future breaches of the peace.<sup>108</sup> The practice of requiring certain persons to give security to keep the peace was known at common law in England

<sup>101</sup> Cf. *Zemel v. Rusk*, 381 U.S. 1 (1965); *Edwards v. California*, 314 U.S. 160, 169 (1941).

<sup>102</sup> *Sibron v. New York*, 392 U.S. 40 (1968); *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>103</sup> *Blair v. United States*, 250 U.S. 273 (1918).

<sup>104</sup> See, e.g., *People ex rel. Ditchik v. Sheriff of Kings County*, 171 Misc. 248, 12 N.Y.S.2d 341 (Sup. Ct. 1939); cf. *Barber v. Moss*, 3 Utah 2d 268, 282 P.2d 838 (1956), noted in 5 UTAH L. REV. 119 (1956).

<sup>105</sup> See generally *Livermore et al., supra* note 1.

<sup>106</sup> See *Livermore*, *Malmquist & Meehl, On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 80-81 (1968).

<sup>107</sup> See note 98 *supra*.

<sup>108</sup> See, e.g., PA. STAT. ANN. tit. 19, §23 (1964):

If any person shall threaten the person of another to wound, kill or destroy him, or do him any harm in person or estate, and the person threatened shall appear before a justice of the peace, and attest, on oath or affirmation, that he believes that by such threatening he is in danger of being hurt in body or estate, such person so threatening . . . shall be bound over, with one sufficient surety, to appear at the next sessions, according to law, and in the meantime to be of good behavior, and keep the peace toward all citizens . . . .

PA. STAT. ANN. tit. 19, §24-27 (1964) provide hearing procedures and require that the justice of the peace suggest the parties compromise their differences.

and the United States, and presently appears in state statutes obligating those who have threatened the life or property of another to post bail as a deterrent to the commission of the act.<sup>109</sup> A person unable to supply the bail can be committed to jail.<sup>110</sup> Regardless of the propriety of this procedure, clearly threatening a person with physical harm<sup>111</sup> is a stronger justification for the imposition of restrictions on personal liberty than the fear that a witness will not appear at trial. A person who has threatened to harm another has, at least, engaged in an overt wrongful act before being required to post security. This would be analogous to requiring security only from witnesses who actually threaten to flee the court's process.<sup>112</sup> In addition, the harm done through physical violence may also be irreparable; failure of a witness to appear can very likely be cured by postponing the trial until he can be compelled to appear.

#### IV. CONSTITUTIONAL QUESTIONS

Whatever one's views on the wisdom of state and federal witness statutes, there remains the question of their constitutionality. The fifth and fourteenth amendment guarantees against the deprivation of liberty without due process of law, and the fourth amendment's protection from unreasonable searches and seizures are the foundations upon which any constitutional attack must be built.

A number of questions arise in the constitutional area. First, are the statutory deprivations justifiable as a proper exercise of the police power of the state to provide for the health, safety and welfare of the people? Second, assuming that some form of statute is constitutional, what form is it? Certainly there must be some showing that the witness is likely to be unavailable at trial before bail or imprisonment can be justified. The third question is more difficult. Is a mere showing that the witness is likely not to appear sufficient to authorize extended detention? It is generally assumed that one cannot be imprisoned on the mere likelihood that one will commit a crime in the future.<sup>113</sup> The Constitution requires a careful balancing of the needs of the state and the extent of deprivation of individual liberty necessary to effectuate them. The precise balance is best made by the legislature, but the

<sup>109</sup> See generally *State ex rel. Yost v. Scouszzio*, 126 W.Va. 135, 27 S.E.2d 451 (1943).

<sup>110</sup> 11 C.J.S. *Breach of Peace* §§ 17-25 (1938).

<sup>111</sup> Breach of the peace statutes require more active antisocial behavior on the part of one required to post bond than is generally required of the material witness. The elements of the offense are making a threat to a person, and putting him in danger of being hurt. See *Commonwealth v. Taub*, 187 Pa. Super. 440, 444, 144 A.2d 628, 630 (1958); PA. STAT. ANN. tit. 19, § 23 (1964). Danger of actual harm and malicious threats are required. *Commonwealth v. Cushard*, 184 Pa. Super. 193, 196, 198, 132 A.2d 366, 368-69 (1957).

<sup>112</sup> See also 24B C.J.S. *Criminal Law* § 2010 (1962): "At common law and under statutes the courts may in some cases require a convicted person to furnish security for good behavior . . ." See, e.g., *Arnold v. State*, 213 Miss. 667, 670, 57 So.2d 484, 485-86 (1952) (conviction for drunken driving).

<sup>113</sup> See, e.g., 22 C.J.S. *Criminal Law* § 37 (1961).

courts can and must impose minimum standards and invalidate schemes which too broadly restrict liberty. Bail or detention should be imposed only where there is no less restrictive way to assure the appearance of a witness. Finally, whatever factors are considered sufficient to authorize detention, what procedural protections must be available to the witness?

Statutes permitting witnesses to be required to make recognizance, post bail, or be detained have regularly been held constitutional by the courts. Their constitutionality rests on dicta in *Barry v. United States ex rel. Cunningham*,<sup>114</sup> where the Supreme Court, referring to a federal statute, said: "The constitutionality of this statute has never been doubted. Similar statutes exist in many of the states and have been enforced without question."<sup>115</sup> In *Barry*, however, the Court cited state cases and secondary authority that confined the right to detain witnesses to situations in which the witness would otherwise be unlikely to appear.<sup>116</sup> The *Barry* case itself involved the arrest of a previously uncooperative witness.<sup>117</sup>

The Supreme Court has not directly ruled on the question since that time, although dicta appear in two other cases indicating the same general acceptance of detention of witnesses. In *Stein v. New York*,<sup>118</sup> while passing on the admissibility of a confession, the Court said: "The duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness."<sup>119</sup> And in *New York v. O'Neill*,<sup>120</sup> the Court found no undue restriction upon interstate travel imposed by the Uniform Witness Act at least partly because in its absence, "Florida undoubtedly could have held respondent within Florida if he had been a material witness in a criminal proceeding within that State."<sup>121</sup>

In the state courts there has been a similar assumption that the statutes are constitutional.<sup>122</sup> The cases, however, are of little prece-

<sup>114</sup> 279 U.S. 597 (1929).

<sup>115</sup> *Id.* at 617.

<sup>116</sup> *Id.* at 617-18, citing *United States v. Lloyd*, 26 F. Cas. 984 (No. 15,614) (C.C.S.D.N.Y. 1860) (bail for witness lowered to \$1000 because of personal hardship, averred intention to answer subpoena, and failure of Government to show that he would not appear); *Crosby v. Potts*, 8 Ga. App. 463, 469, 69 S.E. 582, 584 (1910) (statute construed to allow imprisonment after default only when witness is material and might flee state); *State ex rel. Howard v. Grace*, 18 Minn. 398 (1872) (statute, unlimited on its face, construed to require showing that witness might leave state before imprisonment allowed).

<sup>117</sup> 279 U.S. at 619.

<sup>118</sup> 346 U.S. 156 (1953).

<sup>119</sup> *Id.* at 184 (footnote omitted). See also *People v. Morales*, 22 N.Y.2d 55, 62, 238 N.E.2d 307, 312, 290 N.Y.S.2d 898, 905 (1968).

<sup>120</sup> 359 U.S. 1 (1959).

<sup>121</sup> *Id.* at 7; see cases cited note 16 *supra*; *People v. Hand*, 101 N.J. Super. 43, 51, 242 A.2d 888, 892 (1968); cf. *People v. Morales*, 22 N.Y.2d 55, 62, 238 N.E.2d 307, 312, 290 N.Y.S.2d 898, 905 (1968). See also *United States ex rel. Ginton v. Denno*, 309 F.2d 543 (2d Cir. 1962).

<sup>122</sup> *In re Petrie*, 1 Kan. App. 184, 40 P. 118 (1895); cf. *Quince v. Langlois*, 88 R.I. 438, 149 A.2d 349 (1959).

dential value today, since many of them were decided in days when the due process clause had an interpretation considerably different from the one it has today, and the others (more recent) simply reiterate the cliché that the practice is common and that the state needs witnesses.<sup>123</sup> The early cases, which do indicate some kind of reasoning process and upon which the recent decisions unquestioningly rely, express the fear that there will be no other way to secure the witness when needed. This is the case in *Minnesota ex rel. Howard v. Grace*,<sup>124</sup> and in *Crosby v. Potts*,<sup>125</sup> which state that courts have an inherent power to detain persons.

### A. The Due Process Clause

The due process clause acknowledges both the interest of the individual in "life, liberty, and property" and the interest of the state in performing its governmental functions. If these two interests are in conflict, the traditional approach has been to balance them.<sup>126</sup> In this instance it is a balance between the interest of the individual to be unhampered in his everyday activity and that of the state to assure his presence at trial through restrictions of that activity. The extent of the state interest in having a particular witness present at trial will vary with the seriousness of the charge, the number of prosecution witnesses, and the nature of the witness's testimony. But no matter how crucial the witness to the state's case, where there is no reason to believe that an individual is trying to keep from appearing as a witness, one returns to the question asked seventy years ago by the Minnesota Supreme Court: "[W]hat interest of the state requires the incarceration of such a person?"<sup>127</sup> The same can be said about the requirement of security. If the individual can be deterred from non-compliance with a subpoena by the usual means—the threat of punishment for disobedience—why should additional security be required of him? The requirement of additional security was no doubt in large part premised on the fear that was expressed in *Crosby v. Potts*—that the witness would cross state lines and be "beyond the grasp of any of the court's processes."<sup>128</sup> However, since the adoption of the Uniform Act,<sup>129</sup> the mere fact that a witness is a non-resident, for example,

<sup>123</sup> See, e.g., *United States ex rel. Ginton v. Denno*, 309 F.2d 543 (2d Cir. 1962).

<sup>124</sup> 18 Minn. 398 (1898).

<sup>125</sup> 8 Ga. App. 463, 69 S.E. 582 (1910).

<sup>126</sup> For a general discussion of the due process clause see Ratner, *supra* note 28.

<sup>127</sup> *Minnesota ex rel. Howard v. Grace*, 18 Minn. 398, 403-04 (1898).

<sup>128</sup> 8 Ga. App. 463, 468, 69 S.E. 582, 584 (1910).

<sup>129</sup> In *Barber v. Page*, 390 U.S. 719 (1968), the change in a state's ability to secure the attendance of out-of-state witnesses was recognized. See also *Government of Virgin Islands v. Aquino*, 378 F.2d 540 (2d Cir. 1967). It must be recognized, however, that this change is not conclusive. The Uniform Witness Act has not been universally adopted, and a witness could always leave the country. Finally, in some circumstances—where, for instance, a racial issue is involved—a state might not be completely certain that all other states would as vigorously ferret out recalcitrant witnesses as might be desirable.

is not sufficient to give the state a substantial interest in requiring security or detention.<sup>130</sup> To require bail or detention, the state should have to show that the witness may or will not otherwise appear at the trial. Inquiry regarding the witness's future appearance does not have to be limited to the likelihood that he may voluntarily disappear; it should also include the possibility that others, including the defendant, will prevent his appearance.

Even though the state is protecting a legitimate interest (assuring the presence of all witnesses), and its method *does* implement this interest (detaining all witnesses is one way to assure their presence), the inquiry is not ended.<sup>131</sup> Legislative interests "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."<sup>132</sup> Imprisonment is hardly a trivial deprivation of liberty, and as such the doctrine that a state cannot implement a legitimate policy unless the statute is "narrowly drawn to prevent the supposed evil"<sup>133</sup> should be applicable.<sup>134</sup> The Court applied this standard in *Aptheker v. Secretary of State*<sup>135</sup> to the right to travel under the fifth amendment when it declared a federal statute denying passports to members of the Communist party unconstitutional on its face. Applying the less restrictive alternative test, the Court noted:

This section, judged by its plain import and by the substantive evil which Congress sought to control, sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment.<sup>136</sup>

And in *Griswold v. Connecticut*,<sup>137</sup> seven members of the Court voiced the same concern with state restrictions on fundamental liberties:<sup>138</sup>

<sup>130</sup> The interest must be sufficient to justify the restraint, *see* NAACP v. Alabama, 357 U.S. 449, 464 (1959); *cf.* Cantwell v. Connecticut, 310 U.S. 296, 304 (1940). The effectiveness of a method to implement the legislative goal is also open to judicial supervision. *See* Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1078 (1968) [hereinafter cited as Ratner]. Since detention is obviously effective to achieve the presence of witnesses, this may not be the issue. Still, to require bail of one who cannot supply it is a questionable means of securing a legislative goal. *Cf.* *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957).

<sup>131</sup> "The requirements of due process are a function not only of the extent of the governmental restriction imposed but also of the necessity for the restriction." *Zemel v. Rusk*, 381 U.S. 1, 14 (1964) (footnote omitted). *See generally* Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964). *See also* Struve, *The Less-Restrictive Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463, 1464 (1967).

<sup>132</sup> *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

<sup>133</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940).

<sup>134</sup> The interest must be substantial and regulation narrow. *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964).

<sup>135</sup> 378 U.S. 500 (1964).

<sup>136</sup> *Id.* at 514.

<sup>137</sup> 381 U.S. 479 (1965).

<sup>138</sup> *Id.* at 485-86 (Mr. Justice Douglas, speaking for 5 members of the Court), 503-04 (Mr. Justice White); *see id.* at 500, where Mr. Justice Harlan explicitly reaffirmed his views as stated in his dissenting opinion to *Poe v. Ullman*, 367 U.S. 497, 543, 545 (1961), where the same point is made.

these restrictions are not favored and must not be unnecessarily broad.

Under this analysis, a statute restricting the freedom of movement of a witness without a showing that he is unlikely to appear at trial without the restriction would almost certainly have to fall. Even if there is such a showing, the same logic would require that the restriction be no greater than is necessary to accomplish this goal. For example, the Bail Reform Act of 1966,<sup>139</sup> which governs the detention of witnesses as well as defendants in the federal system, directs the imposition of the least of a graded series of conditions to insure the witness's presence at trial.<sup>140</sup> The alternatives listed in the federal statute are not the only possible ones.<sup>141</sup> Although the fact that an alternative is more expensive does not necessarily mean that it is not required;<sup>142</sup> solutions may vary with the circumstances and resources of the community. Such other possibilities are police guards, detention in a hotel rather than in prison, and periodic check-ins.

A statute constitutional on its face still may be unconstitutionally applied. Such an assertion may be rebutted if it is shown that, for the particular individual, the restriction applied is the least intrusive of those alternatives likely to secure the desired result.<sup>143</sup> If it is assumed that the detention of witnesses can be constitutional because of an actual threat of loss of testimony, detention for months before a defendant is apprehended may still be challenged as unconstitutional. Can the state's need be satisfied in any way short of holding the witness in jail until the trial? Again, the least restrictive alternative argument could be used to limit detention to the shortest practical period of time. Unless the defendant's right of confrontation is impaired when the state introduces a deposition taken from a witness who has failed to appear at trial, due process should limit detention to the period necessary to take a deposition.

The defendant's right to be confronted by the witnesses against him<sup>144</sup> is not absolute. In *Barber v. Page*,<sup>145</sup> the Supreme Court held that a prosecution could not introduce a transcript from a prior hearing

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<sup>139</sup> 18 U.S.C. § 3141-3152 (Supp. III, 1968).

<sup>140</sup> As its title indicates, the Act does authorize judges to require bail from some witnesses. The utility of bail in securing the attendance of defendants for trial is increasingly open to question. "Today fugitives do not go very far or maintain their status as such very long, so no money guarantee is required to insure their appearance when ordered." *Pannell v. United States*, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring).

<sup>141</sup> The Bail Reform Act itself recognizes the possibility of requiring "any other condition deemed reasonably necessary." 18 U.S.C. § 3146(a) (Supp. III, 1968).

<sup>142</sup> See Ratner, *supra* note 130, at 1090.

<sup>143</sup> Cf. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

<sup>144</sup> Made binding on the states by *Douglas v. Alabama*, 380 U.S. 415 (1965), and *Pointer v. Texas*, 380 U.S. 400 (1965).

<sup>145</sup> 390 U.S. 719 (1968).

when it had made no effort to obtain the presence of the witnesses, who were in prison in another state.<sup>146</sup> The Court did not rule out the use of prior testimony where the witnesses were genuinely unavailable. "It is true that there has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant *which was subject to cross-examination by that defendant.*"<sup>147</sup>

The implication of the case is that although a prosecutor must make a bona fide effort to obtain the direct testimony of a witness, where such an effort was made and the witness is still unavailable, prior testimony may be introduced. *Barber v. Page* and the two circuit court cases cited in a footnote in the opinion of the Court<sup>148</sup> could be read to require a narrow interpretation of "unavailable," but seem to be following what has been called a "best effort" approach.<sup>149</sup> Under this approach, if the state has tried and failed to produce a witness for trial—using all reasonably available procedures for compelling him to appear, including the Uniform Act—the court will allow the use of prior testimony. The prior testimony, however, must still have been taken under circumstances that allowed the defendant an opportunity for cross-examination.<sup>150</sup> Those states that detain witnesses before the defendant is apprehended would not have this alternative as long as cross-examination during the deposition is required.<sup>151</sup>

Whenever detention is considered necessary, the state could require an examination of each material witness in the presence of the accused and his attorney. If the witness later disappears, the state could, after making a faithful effort to produce him, use the transcript. There may be exceptional cases where a transcript would not be sufficient—as, for example, in some rape cases where the case will stand or fall on the prosecutrix's behavior on the witness stand. But in most cases, this procedure should suffice.

There is, however, always the possibility that the defendant will assert that the state did not take proper means to secure a witness, par-

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<sup>146</sup> *Id.* at 723.

<sup>147</sup> *Id.* at 722 (emphasis added).

<sup>148</sup> *Virgin Islands v. Aquino*, 378 F.2d 540, 551 (3d Cir. 1967) (witness not unavailable simply because he is in Virgin Islands); *Holman v. Washington*, 364 F.2d 618, 624 (5th Cir. 1966) (requiring proof witness is unavailable), cited 390 U.S. 726 n.6.

<sup>149</sup> Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434, 1439 (1966). The right of confrontation does have exceptions, but there must be "salient and cogent reasons for the deprivation." *Evans v. Dutton*, 400 F.2d 826, 830 (5th Cir. 1968).

<sup>150</sup> See *Barber v. Page*, 390 U.S. 719, 722 (1968). The Court stated that the exception to the hearsay rule for unavailable witnesses is justified because the previous availability of cross-examination provides substantial compliance with the purposes of the requirement of confrontation.

<sup>151</sup> Although the state might attempt to appoint an attorney for the fugitive defendant, such an attempt would generally be of little value. Cross-examination without any possibility of consulting with the defendant (and probably, in most cases, without any meaningful chance for investigation) would be of little value.



ticularly if the witness has made overt threats to disappear. But this claim, of course, can be made even under present procedures. The only real answer, under any system, is for the state to actually make its best effort to secure the witness's presence at trial.

### *B. The Fourth Amendment*

Detention of witnesses that violates the fifth amendment due process clause will also violate the fourth amendment's prohibition of unreasonable seizures as well.<sup>152</sup> Both the arrest of the witness to bring him to execute a recognizance and the detention of a witness who cannot meet bail are seizures of his person<sup>153</sup> and must be reasonable to stay within the first prohibition of the fourth amendment.<sup>154</sup> When a warrant is issued, the probable cause standard should apply.<sup>155</sup> "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."<sup>156</sup> An intrusion is certainly unreasonable if there is no state interest that requires it—as where there is no likelihood that the witness will not respond to a subpoena. Since the application of the fourth amendment, like the fifth, has been considered a balance of the "governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,"<sup>157</sup> the same factors are relevant as in the due process balance.

The detention of a witness who cannot meet bail is much more serious a deprivation of liberty than the limited intrusion involved in the stop-and-frisk cases.<sup>158</sup> In addition, the detained witness is not even "suspected" of having committed a crime. Before detention is reasonable there should be more than a suspicion that the witness will not otherwise appear. A Judge should be convinced that in the absence of some security, the witness will be unavailable.

<sup>152</sup> Cf. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

<sup>153</sup> "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

<sup>154</sup> "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

<sup>155</sup> "No Warrants shall issue but upon probable cause." U.S. CONST. amend. IV.

There are really 2 separate steps involved in depriving a witness of liberty: stopping him on the street for questioning or detaining him at the police station (which may be preceded by issuance of a warrant), and detention for failure to post bail. It is the second which is the concern of this Comment, although both are actually seizures of the person. The standard of probable cause is appropriate only to issuance of the warrant for the initial arrest.

<sup>156</sup> *Schmerber v. California*, 384 U.S. 757, 767 (1966).

<sup>157</sup> *Terry v. Ohio*, 393 U.S. 1, 21, *quoting* *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967).

<sup>158</sup> *Sibron v. New York*, 392 U.S. 40 (1968); *Terry v. Ohio*, 392 U.S. 1 (1968).

In *Terry v. Ohio*,<sup>159</sup> the Court said:

It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of arrest.<sup>160</sup>

But when the witness is taken into custody, whether there is an "arrest" of course depends on how "arrest" is defined. If it is limited to the taking into custody for the purpose of charging with the commission of a crime, the witness is not under "arrest."<sup>161</sup> But the only distinctions that have been advanced as a basis for allowing a standard for the witness "arrest" different from that used for the suspect "arrest" are the difference in stigma attached to the detention involving an accusation of crime<sup>162</sup> and the difficulty of creating a standard for the arrest of witnesses based on their past behavior. But the witness's detention still involves the imputation that, unrestrained, he would commit a wrongful act—and, furthermore, if he is restrained he will have no way of disproving the imputation. And even if the arrest of a witness cannot to be based on the same standard used for criminal suspects, the standard should be one that is based on the past behavior of the witness, indicating that he will not comply with reasonable requests by authority.<sup>163</sup>

There is really no Supreme Court authority for the "arrest" and taking into custody of a witness other than *Barry v. United States ex rel. Cunningham*.<sup>164</sup> It is probable that a constitutional result will be a balance which allows police to require witnesses to forfeit some liberty in order to aid the state in investigating a crime as long as the intrusion is reasonable under all the circumstances. Just as an individual may have to endure the inconvenience of attending a trial and testifying as a witness, he may be required to endure the inconvenience of police questioning in a reasonable manner, such as detention until preliminary examination, but he should not be subject to procedures applicable to a

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<sup>159</sup> 392 U.S. 1 (1968).

<sup>160</sup> *Id.* at 26.

<sup>161</sup> See *W. LA FAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 4 (1965).

<sup>162</sup> See *People ex rel. Fusco v. Ryan*, 204 Misc. 861, 871, 124 N.Y.S.2d 690, 700-01 (Sup. Ct. 1953), where the court distinguished the consequences of conviction for a crime from those of detention of a material witness.

<sup>163</sup> *State v. Hand*, 101 N.J. Super. 43, 242 A.2d 888 (1968), suggested that one relevant consideration before arresting a material witness would be whether he was a "known prevaricator." *Id.* at 57, 242 A.2d at 895. Under the N.Y. PROPOSED CRIMINAL CODE, a warrant can be issued for a witness to appear at a hearing to determine whether he should be required to post bail if the allegations to the court "show the witness would be unlikely to respond to an order or he had previously disobeyed such an order." *Id.* § 330.30.

<sup>164</sup> 279 U.S. 597 (1929). See notes 115-17 *supra* and accompanying text.

suspect, amounting to an actual arrest, unless he can be shown at least to have breached a duty to cooperate and aid the state.<sup>165</sup>

### C. Procedural Due Process

Assuming the constitutionality of a statute requiring the material witness to post security upon proof that less restrictive means cannot assure his appearance at trial, to what procedural safeguards is a witness, accused of a probable failure to appear, entitled? Should the procedural safeguards afforded to such an "accused" differ from those the state must grant a criminal defendant?<sup>166</sup> Although the consequences of the proceeding may be less serious for the witness than for the defendant,<sup>167</sup> the witness, nonetheless, faces a severe deprivation of liberty.<sup>168</sup>

#### 1. Hearing

Despite earlier cases to the contrary,<sup>169</sup> the current notion of "due process" requires a hearing before either bail is set or detention ordered upon a witness's failure to meet bail.<sup>170</sup> Under the New York Code of Criminal Procedure, a judge cannot compel a witness to secure his future appearance before "an opportunity has been given to such a

<sup>165</sup> Conceivably a witness could raise the argument that the equal protection clause prohibits his detention in lieu of a required bail which he cannot afford to post. See Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 999 (1965); cf. Griffin v. Illinois, 351 U.S. 12 (1956). But until the equal protection clause is successfully used by defendants against bail, it is unlikely to provide relief in the less pressing problem area of detention of witnesses. See generally W. LAFAYE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY, 411-35 (1964); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955). Note, *Discrimination Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 446-47 (1967).

<sup>166</sup> See, e.g., Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961).

<sup>167</sup> See note 161 *supra*.

<sup>168</sup> But see People ex rel. Fusco v. Ryan, 204 Misc. 861, 871, 124 N.Y.S.2d 690, 697 (Sup. Ct. 1953):

[A]n order of commitment and bail as a necessary and material witness does not entail many of the consequences of a judgment of a felony conviction—for example, suspension of civil rights, forfeiture of public office, loss of right to vote, subjection to deportation if an alien, or to denaturalization proceedings if not a native-born, computation in case of a multiple criminal offender, effect upon credibility as a witness, etc. Therefore, the fact that one has been held under section 618-b is not in any sense tantamount to conviction for the commission of a crime.

<sup>169</sup> *In re Petrie*, 1 Kan. App. 184, 40 P. 118 (1895). *Contra*, *Minnesota ex rel. Howard v. Grace*, 18 Minn. 398 (1889).

<sup>170</sup> See *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963); *Greene v. McElroy*, 360 U.S. 474 (1959); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961). Even cases giving deference to procedures of another jurisdiction have required notice and hearing. See, e.g., *Rogers v. Peck*, 199 U.S. 425, 435 (1905); *Hooker v. Los Angeles*, 188 U.S. 314, 318 (1903); *Simon v. Craft*, 182 U.S. 427, 437 (1901). Due process and the sixth amendment guarantee a defendant summarily charged with contempt an opportunity to be heard and to be represented by counsel. *Holt v. Virginia*, 381 U.S. 131, 136 (1965).

person to appear before such judge and be heard in opposition thereto . . . .”<sup>171</sup> The judge must be satisfied “that such person . . . is a necessary and material witness for the people in a criminal action . . . .”<sup>172</sup>

The Constitution does not require that a due process hearing be the same in every case.<sup>173</sup> State criminal process traditionally met constitutional standards if it “did not conflict with the ‘fundamental principles of liberty and justice’ . . . .”<sup>174</sup> But this loose approach to due process has been tightened by recent decisions. The question is no longer whether “a civilized system could be imagined that would not accord a particular protection . . . .”<sup>175</sup> Rather the question has become “whether . . . a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty.”<sup>176</sup> Certainly, the witness’s right to confront and cross-examine those who claim that he will attempt to avoid testifying should be considered fundamental and, therefore, required of any state bail proceeding. A state cannot deny to a criminal defendant the rights of confrontation and cross-examination at his preliminary hearing.<sup>177</sup> And these rights are not unique to criminal proceedings. In *Greene v. McElroy*,<sup>178</sup> the Supreme Court said that an “immutable” principle of our jurisprudence was that

where Governmental action seriously injures an individual, and the reasonableness of the action depends on fact finding, the evidence used to prove the government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . . We have formalized these protections in the requirements of confrontation and cross-examination.<sup>179</sup>

But detention hearings conducted pursuant to state statutes seldom guarantee these rights.<sup>180</sup> The district attorney need present only his sworn statement as proof of the likelihood that the witness will not appear; the witness is then given an opportunity to show cause why he

<sup>171</sup> N.Y. CODE CRIM. PROC. § 618-a (McKinney 1958).

<sup>172</sup> *Id.* New York does not provide for detention of defense witnesses.

<sup>173</sup> See *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950).

<sup>174</sup> *Bute v. Illinois*, 333 U.S. 640, 649 (1948), quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926).

<sup>175</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968).

<sup>176</sup> *Id.* at 149-50 n.14.

<sup>177</sup> *Pointer v. Texas*, 380 U.S. 400 (1965).

<sup>178</sup> 360 U.S. 474 (1959).

<sup>179</sup> *Id.* at 496; cf. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961), where the Court allowed revocation of a security clearance without a hearing only because of the strong “national security” interest, after noting that the employee affected would lose her job but not, as in *Green*, her livelihood.

<sup>180</sup> See, e.g., N.Y. CODE CRIM. PROC. § 618-b (McKinney 1958).

need not be detained.<sup>181</sup> Such a procedure hardly seems justifiable. The state should be required to show more proof than a sworn statement, especially when detention is a likely outcome.<sup>182</sup> Such factors as the witness's residence, financial responsibility, cooperativeness and relationship to the defendant or offense should be presented for judicial scrutiny.<sup>183</sup> Factors such as the severity of the crime, the number of witnesses for the particular issue, and the danger to the witness, which determine the strength of the state's interest, should also be presented.

What is required of a witness's hearing might well vary in relation to the severity of the possible consequences of such hearing. Where the thrust of the witness detention statute is toward less restrictive alternatives, fewer procedural safeguards might be warranted. But where the thrust of the statute and experience under it indicate high bail requirements and likely detention, more rigorous procedural safeguards must be invoked. An instructive analogy in the relationship of possible consequences to procedural safeguards is found in the requirement of jury trials for serious crimes but not for petty offenses.<sup>184</sup>

## 2. Right to Counsel

Under New York law a witness is entitled upon request to be represented by counsel at a detention hearing.<sup>185</sup> Denial of the witness's request renders such proceeding unlawful.<sup>186</sup> A 1953 decision, however, held that a judge's failure to advise a witness of his right "to demand and procure counsel" violated no statutory or constitutional

<sup>181</sup> *Id.*

<sup>182</sup> Arguably, the light burden placed on the state might be justified on the ground that a more stringent requirement could reveal the state's case against the defendant. But it is difficult to imagine why evidence showing that the *witness* was unlikely to appear at trial would relate to the prosecution's case against the defendant. The most such an argument could do would be to carve out an exception for this narrow class of cases. And it is hard to give the argument even that much weight. Whatever the merits of the case against pretrial discovery, it is difficult to see in it a justification for the incarceration of an innocent third party.

<sup>183</sup> New York's proposed Code of Criminal Procedure goes a long way in this direction. It provides for a hearing at which the prosecution must prove "by a preponderance of the evidence" that the witness will not be amenable to a subpoena "at the time when his attendance will be sought." N.Y. PROPOSED CRIM. CODE §§ 330.50(1)(a), 330.20(1)(b). All testimony at the hearing (except that of the witness, who may testify sworn or unsworn) must be under oath, although the right of confrontation is sharply limited by the availability of hearsay testimony. *Id.* § 330.50(1). The witness is given the same right to counsel—including instructions and free counsel if required—as a felony defendant. *Id.* § 330.40(1).

<sup>184</sup> See *Duncan v. Louisiana*, 391 U.S. 145 (1968). The rights of a person charged with contempt are especially relevant since a witness who disobeys a subpoena is presumably charged in a criminal contempt proceeding. Those charged with criminal contempt have rights of counsel, hearing, and jury similar to those afforded other defendants. See *Bloom v. Illinois*, 391 U.S. 194 (1968); *Holt v. Virginia*, 381 U.S. 131 (1965); *In re Oliver*, 333 U.S. 257 (1948).

<sup>185</sup> *People ex rel. Fusco v. Ryan*, 204 Misc. 861, 124 N.Y.S.2d 690 (Sup. Ct. 1953).

<sup>186</sup> *Id.* at 870, 124 N.Y.S.2d at 696.

provision.<sup>187</sup> While this is still the law of that jurisdiction,<sup>188</sup> current practice calls for the hearing magistrate to advise the witness of his right to counsel, and, if the witness cannot afford counsel, to assign counsel.<sup>189</sup>

Most witness cases antedate *Gideon*<sup>190</sup> and, therefore, provide little authority on the question whether a state court must appoint counsel for indigent witnesses. *Gideon* itself found only that the Constitution makes no distinction between capital and noncapital cases, between deprivations of "life" and deprivations of "liberty." But does the Constitution permit the states to distinguish between brief deprivations of liberty and substantial deprivations?<sup>191</sup> State courts apparently believe it does. Confronted with arguments that due process "includes only those procedures that are fair and feasible,"<sup>192</sup> state courts today find that an indigent defendant has no right to appointed counsel in all misdemeanor cases or in any traffic or petty offense prosecutions.<sup>193</sup> Until state courts are constitutionally compelled to appoint counsel for indigent accused in all cases involving the likelihood of actual incarceration, it will be difficult to maintain that counsel must be appointed for the indigent witness.<sup>194</sup>

But the indigent witness, who is held without even a suspicion that he has committed a misdemeanor or petty offense, should arguably be afforded procedural safeguards which are not constitutionally required for the detention of the accused.<sup>195</sup> Where the witness may become the accused,<sup>196</sup> the state has a special interest in advising the witness of his right to appointed counsel. Such a warning could save from exclusion evidence obtained through in-custody interrogation of a witness who later becomes a defendant.<sup>197</sup>

<sup>187</sup> *Id.* at 872, 124 N.Y.S.2d at 701.

<sup>188</sup> *People ex rel. Van Der Beek v. McCloskey*, 18 App. Div. 2d 205, 238 N.Y.S.D.2d 676 (1963).

<sup>189</sup> Comment, *Witnesses—Imprisonment of the Material Witness for Failure to Give Bond*, 40 NEB. L. REV. 503, 511 n.42 (1961).

<sup>190</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>191</sup> *Id.* at 351 (Harlan, J., concurring). Mr. Justice Harlan has suggested the *Gideon* rule applies only "to offenses which . . . carry the possibility of a substantial prison sentence." *Id.*

<sup>192</sup> L. HALL & Y. KAMISAR, *MODERN CRIMINAL PROCEDURE* 296 (1966) (quoting Mr. Justice Schaefer of the Illinois Supreme Court); see Doub & Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality*, 107 U. PA. L. REV. 443, 447 (1959).

<sup>193</sup> See *People v. Litterio*, 16 N.Y.2d 307, 266 N.Y.S.2d 368, 213 N.E.2d 670 (1965), cert. denied, 384 U.S. 911 (1966); Kamisar & Choper, *The Right to Counsel in Minnesota*, 1, 68-69, 77 (1963).

<sup>194</sup> On the other hand, this may not be true in exceptional cases.

<sup>195</sup> Massachusetts recently amended its witness statute to provide counsel. MASS. ANN. LAWS ch. 276, § 47 (1968). See also the proposed New York statute, summarized at note 183 *supra*.

<sup>196</sup> See text accompanying notes 201-02 *infra*.

<sup>197</sup> Clearly, the *Miranda* warnings must now be given if the testimony is to be used against the witness. *Id.*

## V. ABUSE OF DETENTION

The relatively easy standards used to hold a material witness under present statutes are easily subject to abuse, and the procedure can readily turn into a "ruse to interrogate or hold a prospective defendant."<sup>198</sup> This problem is usually posed when the state attempts to use against a defendant a confession,<sup>199</sup> or evidence from a search,<sup>200</sup> obtained during the period the defendant was detained as a "witness." But the Supreme Court's recent decision in *Oroczo v. Texas*,<sup>201</sup> should bar the use of any statements obtained from an incarcerated witness unless *Miranda* warnings have been given. Reversing a conviction founded on statements taken during interrogation of the defendant at home in his bedroom, the Court, speaking through Justice Black, said:

The State has argued here that since petitioner was interrogated on his own bed, in familiar surroundings, our *Miranda* holding should not apply. . . . But the opinion iterated and reiterated the absolute necessity for officers interrogating people "in custody" to give the described warnings. . . . The *Miranda* opinion declared that the warnings were required when the person being interrogated was "in custody at the station or otherwise deprived of his freedom of action in any way." 384 U.S. 436, 477. (Emphasis supplied.) The decision of this Court in *Miranda* was reached after careful consideration and was announced in lengthy opinions by both the majority and dissenting Justices. There is no need to recanvass these arguments again. We do not, as the dissent implies, expand or extend to the slightest our *Miranda* decision. We do adhere to our well-considered holding in that case . . . .<sup>202</sup>

The point should be obvious: *any* custodial interrogation must be preceded by *Miranda* warnings if its fruits are to be used against the person interrogated. The reasoning of *Oroczo* does not allow for an exception in the case of a detained material witness.

The necessity of warning a detained witness of his rights under the *Miranda* standard—including his right to counsel—may curtail attempts to use witness statutes to interrogate suspects, but it will not do

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<sup>198</sup> *People ex rel. Van Der Beek v. McCloskey*, 18 App. Div.2d 205, 210, 238 N.Y.S.2d 676, 682 (1963); see *People v. Clayton*, 28 App. Div.2d 543, 279 N.Y.S.2d 605 (1967).

<sup>199</sup> See *United States ex rel. Ginton v. Denno*, 200 F. Supp. 643 (S.D.N.Y. 1962), *aff'd*, 309 F.2d 543 (2d. Cir. 1962), *cert. denied*, 372 U.S. 938 (1963).

<sup>200</sup> See *State v. Hand*, 101 N.J. Super. 43, 242 A.2d 888 (1968).

<sup>201</sup> *Oroczo v. Texas*, 37 U.S.L.W. 4060 (U.S., Mar. 25, 1969).

<sup>202</sup> *Id.* at 4060-61.

the whole job. If the standards for detention are easily satisfied, that is, if bail which cannot be met is allowed with very little proof of an intention to avoid testifying, there might be attempts to detain suspects as material witnesses, give the required warnings, and still be in a better position for questioning than if the suspect could not be detained. This abuse is alleviated by statutes that allow detention only after a defendant has been charged with the crime, and would be further decreased if detention of witnesses were the exception and less restrictive alternatives were the rule.

### *Remedies of the Witness*

No matter what procedure is followed when a witness is incarcerated, there remains the serious question of remedy. It seems clear that exclusionary rules comparable to those created to enforce the rights of defendants in criminal proceedings are—except in the rare case where the witness is himself charged with a crime as a result of interrogation during the period he is detained<sup>203</sup>—unlikely to be developed.<sup>204</sup> Even if they were, they would be unlikely to cover all the situations that could arise. If the detained witness were one called by the defense, it would be difficult indeed to bar the use at trial of statements tainted by conduct not of the defendant, but of the state. Furthermore, in many cases the exclusionary rule fashioned would have to be exceedingly broad to be of any use: the exclusion of the witness's testimony at trial would have to be based on the fact of his illegal detention alone, for in many cases the police will desire only to hold the witness, not to interrogate him.

For his most pressing need—freedom—the detained witness is remitted to contending his detention on a petition for habeas corpus.<sup>205</sup> Detention already suffered may be remedied by suit against the person who caused the imprisonment, or against the state.<sup>206</sup> At state law, however, such suits are likely to give little solace. A remedy against the state itself is available only by statute, and such statutes are rare; the plaintiffs in *Quince v. Rhode Island*,<sup>207</sup> who were held as material witnesses for 158 days because they could not make \$5,000 bail set without a hearing, were able to maintain their suit only because of a

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<sup>203</sup> See text accompanying notes 201-02 *supra* for the argument that statements so obtained must be excluded unless *Miranda* warnings have been given.

<sup>204</sup> One of the particular problems likely to arise in the fashioning of any such rule would be the problem of standing: the only person available to challenge the admissibility of evidence at trial would be the defendant.

<sup>205</sup> See, e.g., *Quince v. Langlois*, 88 R.I. 438, 149 A.2d 348 (1959).

<sup>206</sup> E.g., *Quince v. Rhode Island*, 94 R.I. 200, 179 A.2d 485 (1962).

<sup>207</sup> 94 R.I. 200, 179 A.2d 485 (1962). In that case, the plaintiffs had been taken into custody as material witnesses to a homicide because of a chance observation. They were held for two days on no charge, at which point the district court set bail at \$5000 without a hearing, and they were held for 158 days in jail before they obtained their release. Each witness recovered \$5000 from the state.



private act passed by the state legislature. Suits against state officials are generally unsound, as their limited resources make them unsatisfactory defendants even if the formidable mass of immunity rules can be surmounted.<sup>208</sup>

Federal law, at least in theory, provides a broader avenue. The Civil Rights Act of 1871<sup>209</sup> grants a federal right of action against persons acting "under color" of state law to deprive others of constitutional rights. Although the Supreme Court in *Monroe v. Pape*<sup>210</sup> construed the statute not to grant a right to recover damages from the state or its subdivisions, the immunity of individual state officials against such actions is considerably narrower than that under most state law.<sup>211</sup> Even this, however, is likely in practice to be of little help. Although administrative personnel such as policemen are liable absent a "reasonable belief" that their action was constitutional,<sup>212</sup> judicial officers retain an absolute immunity from suit<sup>213</sup>—and, in most if not all cases, judicial personnel will be the only ones whose actions could subject them to suit.<sup>214</sup>

In practice, therefore, there will be a remedy for detention already suffered only in the most extreme cases. As a consequence, the availability of procedures to terminate illegal detention presently suffered is of particular importance. Crucial to the use of any such procedures is the availability of counsel. Since the witness detained for failure to make bail is particularly likely to be indigent, appointed counsel must be available if he is to have any real chance of obtaining his freedom before the state decides to return it to him. If counsel is not available, such persons are likely to suffer at least brief periods of detention with-

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<sup>208</sup> For an exhaustive discussion of the general failure of state tort laws to provide remedies for violations of individual rights, see Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493 (1955).

<sup>209</sup> 42 U.S.C. § 1983 (1964).

<sup>210</sup> 265 U.S. 167 (1961).

<sup>211</sup> For example, malice need not be alleged. See, e.g., *Pierson v. Ray*, 386 U.S. 547 (1967); *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964).

<sup>212</sup> *Pierson v. Ray*, 386 U.S. 547, 557 (1967).

<sup>213</sup> *Id.* at 554. The immunity disappears if the officer is acting completely outside his jurisdiction, as if the judge of a probate court purports to try a criminal case, but such situations are—to say the least—rare. Although the Supreme Court has not ruled on the issue, it is generally assumed that prosecutors partake of judicial immunity from tort liability for their actions. 27 C.J.S. *Dist. & Pros. Att'ys* § 16 (1959).

<sup>214</sup> If the deprivation of rights is effected under color of federal law, remedy is even more difficult, for the Civil Rights Act applies only to action under color of state (or local federal, such as the District of Columbia) law. For actions against federal officers, plaintiffs are generally limited to such remedies as may be available under state law in state courts. *Bell v. Hood*, 71 F. Supp. 813 (S.D. Cal. 1947), declined to find a right of recovery against federal officers absent statutory authorization and that decision has been followed with little discussion in the few instances that the issue has arisen since that time. E.g., *Johnston v. Earle*, 245 F.2d 793 (9th Cir. 1957). For the contrary argument, see Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. Pa. L. Rev. 1 (1968).

out complaint,<sup>215</sup> and the state will therefore have an incentive to avoid only the most flagrant abuses.<sup>216</sup>

## VI. CONCLUSION

The state policy at stake in requiring a witness to post security, and detaining him if he cannot produce it, is that of securing the presence of a witness when required to carry out the judicial enforcement of its laws. This purpose must be kept in mind in examining the means appropriate to that end. But it is not enough to repeat the maxim that the duty to disclose knowledge of a crime is so important that "one known to be innocent may be detained in the absence of bail as a material witness."<sup>217</sup>

The balance between the rights of the witness and the interest of the state is a delicate one and depends upon a rational and sensitive procedure that does not automatically require bail of every material witness. Although more than one solution is possible, a procedure should include only requirements that are *actually* needed and that in fact do secure the presence of witnesses.

One solution mentioned is, of course, to abolish all prior security other than a personal undertaking and to punish severely failure to appear. If a state does not wish to go this far, it is still possible to devise a fair system keeping in mind the following criteria: (1) no one form of security, such as bail, should be automatically required; (2) security of any kind should be required only when the witness has behaved in a way which indicates that he "threatens" to avoid performing his obligation; (3) detention should be ordered only where there is no practical alternative and only if the witness's testimony is essential to the state or the accused; (4) detention whenever ordered should be for a specifically limited time. An examination of the witness, at which his deposition would be taken, should be considered. This, of course, will not be useful if the defendant has not been apprehended, but detention prior to apprehension is seriously questionable, even if some other security provision is justified; and (5) the same procedure should be used for defense and for prosecution witnesses.

States that ignore the reason for the requirement of security, and do not first consider whether the usual means—including the Uniform Act—are a sufficient sanction for noncompliance are almost making it

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<sup>215</sup> Cf. W. LaFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 483-89 (1965), discussing the same problem where persons are arrested with no intent by the police to charge them with the commission of crime. "[M]any of the persons arrested for purposes other than prosecution do not attempt to secure their release on habeas corpus. Knowing that they will shortly be released anyway, they prefer not to go to this expense." *Id.* 485.

<sup>216</sup> "[E]xperience has taught that [the exclusionary rule] is the only effective deterrent to police misconduct in the criminal context." *Terry v. Ohio*, 392 U.S. 1, 12 (1968).

<sup>217</sup> *Stein v. New York*, 346 U.S. 156, 184 (1952).

a crime<sup>218</sup> to be a material witness, when in fact being a witness may be like being tall or short—beyond the individual's control. If the procedures against witnesses involve an imposition of severe restrictions on liberty, the state will be defeating its own objective. Instead of encouraging its citizens to be responsible and volunteer information which the state is seeking, it will make them reluctant to come forward and incur the severe consequences of being a witness. Admittedly, many witnesses are not "innocent" respectable citizens, but "a scheme of ordered liberty"<sup>219</sup> cannot rest on the basis of imposing restrictions on all in order to deter a few.

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<sup>218</sup> Cf. *Robinson v. California*, 370 U.S. 660 (1966). The state cannot make a crime out of any behavior it wishes.

<sup>219</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).